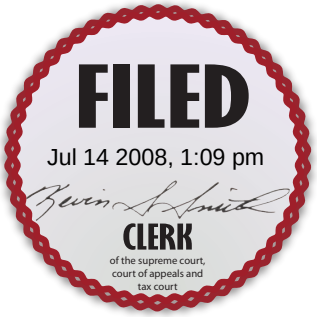


ATTORNEY FOR APPELLANT:

**DAVID F. McNAMAR**
McNamar & Associates, P.C.
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

**KATHERINE A. HARMON**
Cohen & Malad, LLP
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| AUBRIE SANDERS, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 29A02-0712-CV-1057 |
| | ) | |
| JOHN SANDERS, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0604-DR-345

**July 14, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

David McNamar, attorney for Aubrie Sanders, appeals the trial court's order directing him to pay the attorney fees of Katherine Harmon, attorney for John Sanders, as discovery sanctions. We affirm in part and reverse in part.

## Issue

The sole restated issue that we address is whether the trial court properly sanctioned McNamar for alleged discovery violations in the Sanders' divorce action.

## Facts

On April 19, 2006, Aubrie filed for dissolution of her marriage to John. On January 25, 2007, Aubrie, by her attorney McNamar, filed a motion to compel discovery. The motion sought financial documents related to businesses in which John was involved, for purposes of valuing his interest in those businesses. John had already turned over some documentation earlier in the discovery process, but McNamar believed there was more information that John was withholding. McNamar also wanted to force John to meet with an expert business appraiser to go over his business records.

The trial court conducted a hearing on the motion on May 4, 2007. During the hearing, Harmon represented that John had turned over all relevant financial records that were in his possession. At the conclusion of the hearing, the trial court denied the motion to compel, finding that John had provided all documents that were in his possession and that McNamar could obtain other documents as needed through third-party discovery. It refused to require John to have an informal meeting with the expert business appraiser, and awarded attorney fees of $750.00 in John's favor for having successfully defended

the motion to compel. Finally, the court ordered that any depositions in the case be coordinated between the parties "to ensure they occur at an acceptable time and place." App. p. 241.

After this order was issued, the parties attempted to schedule depositions for John and his business partner. McNamar wanted them to be held at John's office. Harmon wanted them to be held at her office, because there was no suitable place to conduct depositions at John's office without interrupting the business' activities. After exchanging heated emails, McNamar finally emailed Harmon, "I will determine where the deposition will be taken—since I am the one noticing the same." Id. at 256. Thereafter, on May 16, 2007, McNamar issued a notice of deposition and subpoena duces tecum, stating that John and his business partner would be deposed at John's office on June 4, 2007, and requesting the production of financial documents.

On May 17, 2007, Harmon filed a motion to quash the notice of deposition and subpoena duces tecum. She also requested additional sanctions to be imposed. The motion to quash alleged that the documents sought by the subpoena were the same ones McNamar sought through his motion to compel, which had just been denied. On May 29, 2007,[1] the trial court granted the motion to quash and required McNamar to reschedule John's deposition to occur at "a mutually agreeable location other than [John's] business location." Id. at 271. The court reserved consideration of the sanctions request until the final hearing. On June 1, 2007, a Friday, Harmon filed a request for clarification of the

[1] This order apparently was signed May 18, 2007, but was not file-stamped until May 29, 2007.

May 29 order because it did not mention the deposition of John's business partner. That same day, the trial court issued an order clarifying that the partner's deposition also had to take place somewhere other than John's office.

John was deposed on June 4, 2007, at a court reporter's office. The business partner failed to appear for his deposition. At 12:10 p.m., after completion of the deposition, Harmon placed or received a call on her cell phone. McNamar and his paralegal later claimed that they heard Harmon say something to the effect of, "and thank Todd for coming in from his vacation to sign that order for me." Id. at 292. McNamar asserts this referred to Todd Ruetz, the commissioner presiding over the Sanders's proceedings, coming into the office on June 1, 2007, to sign the clarification order.

On June 12, 2007, McNamar filed a motion to correct error, motion to reconsider, and "Request for the Judge of the Court to Rule on All Matters from this Time Forward." Id. at 284. This motion requested granting of the earlier motion to compel, reversal of the earlier $750.00 sanctions award, and the scheduling of a deposition of John's business partner at John's office. It also asked that the presiding judge hear all further matters in the case, after McNamar accused Harmon and Commissioner Ruetz of "conduct [that] smacks of favoritism and possible ex parte communications. At a minimum, Ms. Harmon seems to enjoy an almost instant granting of her motions without allowing any response time for opposing counsel." Id. at 292.

Also on June 12, 2007, Harmon filed a "Request for Hearing, Motion to Strike, and Sanctions." Appellee's App. at 5. This filing sought to have McNamar's allegations of unethical conduct stricken from the record and for further sanctions to be imposed

against him. On July 12, 2007, the trial court issued an order, signed by Commissioner Ruetz, denying McNamar's motion in its entirety. The order stated that Commissioner Ruetz was not on vacation on June 1, 2007, and his signing of the clarification order on that date was not the result of any improper action. The order delayed consideration of Harmon's motion to strike and request for sanctions until the scheduled final dissolution hearing, which was set for August 20, 2007.

Before that date, Aubrie and John reconciled and they requested dismissal of the dissolution action. However, the trial court still conducted a hearing on August 20, 2007, to address Harmon's outstanding motion. Under oath, Harmon denied saying during her phone call on June 4, 2007, "and thank Todd for coming in from his vacation or day off to rule on my motion." Tr. p. 140. She also submitted cell phone records indicating that she did place or receive a phone call at 12:10 p.m. that day, but it was to her office, not the trial court's offices.

On August 28, 2007, the trial court ordered dismissal of the dissolution action. In that same order, the trial court stated, "such statements concerning the alleged phone conversation, allegations and/or comments about Commissioner Todd Ruetz and counsel for [John] were not supported by the evidence and the Court, therefore, finds them to be untrue and improper." App. pp. 302-03. Therefore, it ordered McNamar's motion that made such allegations stricken from the record. It also ordered McNamar to pay attorney fees to Harmon in the amount $2223.00, representing time spent on the disputes over the location of depositions, the subpoenas duces tecum, and McNamar's June 12, 2007 motion, and specifically stated that McNamar (not Aubrie) was to pay that amount to

Harmon, plus the earlier $750.00 sanction. Finally, the order stated that "this Court will provide a certified copy of the transcript of the . . . August 22 [sic], 2007 hearing to the Indiana Supreme Court Disciplinary Commission for their review" of any possible misconduct by McNamar.[2] Id. at 303. McNamar now appeals.[3]

**Analysis**

McNamar claims the trial court erred in several of its discovery-related rulings and in imposing sanctions against him. Given the Sanders' dismissal of their dissolution action, the substance of the trial court's discovery rulings clearly is moot, except to the extent they impact the sanctions analysis. There is no question that McNamar was entitled to reasonable discovery related to the valuation of John's business interests for purposes of valuing and dividing the marital estate, if the divorce had been finalized. See Balicki v. Balicki, 837 N.E.2d 532, 538-39 (Ind. Ct. App. 2005), trans. denied. The specific question here is whether the trial court erred in concluding that McNamar engaged in unreasonable discovery tactics, warranting the imposition of sanctions.

The trial court has broad discretion in ruling on discovery issues, including appropriate sanctions for misuse of the discovery process. See Pfaffenberger v. Jackson County Reg'l Sewer Dist., 785 N.E.2d 1180, 1183 (Ind. Ct. App. 2003). We will reverse a discovery-related ruling only when the trial court has abused its discretion. Id. "An

[2] It does not appear that any disciplinary action has been filed against McNamar.

[3] There is considerable dispute between McNamar and Harmon as to whether they and their respective law firms are proper parties in this appeal. We observe that due to the reconciliation of the Sanders and the dismissal of their dissolution action, the only outstanding order in this appeal is the one requiring McNamar to pay money to Harmon. Although the caption in this case may still bear the Sanders' names, McNamar and Harmon are the only real parties in interest left at this stage in the litigation.

abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or when the trial court has misinterpreted the law." Id. Additionally, we determine whether the evidence serves as a rational basis for the trial court's decision and may not reweigh the evidence or assess the credibility of witnesses. Allstate Ins. Co. v. Scroghan, 851 N.E.2d 317, 322 (Ind. Ct. App. 2006).

We first discuss the $750.00 sanction imposed by the trial court when it denied McNamar's motion to compel discovery. McNamar contends in the first place that the motion to compel should have been granted, which necessarily would negate the $750.00 sanction, relying heavily on Trost-Steffen v. Steffen, 772 N.E.2d 500, 514 (Ind. Ct. App. 2002), trans. denied. There, we affirmed an award of sanctions under Indiana Trial Rule 37 against a party who refused to produce certain financial documents. Trost-Steffen, 772 N.E.2d at 514. We noted that although the party claimed not to possess the documents and that she maintained "that she complied to the best of her ability, the trial court apparently remained unconvinced . . . ." Id.

McNamar's reliance on Trost-Steffen is misplaced. That case affirmed an award of discovery sanctions against a party who claimed not to have certain documents in her possession. The trial court in that case did not believe that claim. Here, however, the trial court clearly did believe John's claim that he did not possess any more documents and that he had been as cooperative as possible in the discovery process. We emphasize that just because one trial court in one case ruled one way, a different trial court in a different case is not required to rule the same way, even when the facts in both cases are

similar. See Maxwell v. Maxwell, 850 N.E.2d 969, 974 (Ind. Ct. App. 2006), trans. denied. Such a proposition would undermine each trial court's ability to weigh evidence and judge witness credibility in each individual case. That the trial court here might have ruled in McNamar's favor does not mean that it was required to do so. The record supports the ruling in Harmon's favor, namely that John had cooperated in discovery and any additional records would have to be obtained through third-party discovery.

As for the award of sanctions upon proper discretionary denial of the motion to compel, Indiana Trial Rule 37(A)(4) states in part:

> If the motion [to compel] is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

In a case addressing the award of sanctions under this rule, we have held that "a presumption arises that the trial court will also order reimbursement of the prevailing party's reasonable expenses." Penn Cent. Corp. v. Buchanan, 712 N.E.2d 508, 511 (Ind. Ct. App. 1999), trans. denied. "'This award is mandatory, subject only to a showing that the losing party's conduct was substantially justified, or that other circumstances make an award of expenses unjust.'" Id. (quoting Price by Price v. Methodist Hosps., Inc., 604 N.E.2d 652, 654 (Ind. Ct. App. 1992)). "[A] person is 'substantially justified' in seeking to compel or in resisting discovery, for purposes of avoiding the sanctions provided by

T.R. 37(A)(4), if reasonable persons could conclude that a genuine issue existed as to whether a person was bound to comply with the requested discovery." Id. at 513.

Here, we find reasonable persons could have concluded that the first motion to compel was necessary. The information sought was relevant to determining the value of the marital estate. Additionally, Trost-Steffen would have provided a basis for rejecting John's claims not to have the vital documents in his possession, even if ultimately the trial court here was not bound to follow that case. The denial of the motion to compel was based entirely on credibility assessments by the trial court; on its face, McNamar's motion to compel was not unreasonable. We conclude McNamar was "substantially justified" in filing that motion. Thus, we reverse the imposition of $750.00 in sanctions against McNamar in connection with that filing.

We reach a different conclusion with respect to the additional $2223.00 in sanctions. That amount was imposed as a result of McNamar's obdurate behavior regarding the scheduling of depositions, continuing to seek documents that were the subject of the denied motion to compel, and making what the trial court concluded were unfounded accusations of unethical conduct by Harmon and Commissioner Ruetz.

McNamar contends that in insisting that John and his business partner's depositions be conducted at their office, he merely was complying with Indiana Trial Rule 45(D)(2). That rule states in part, "An individual may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court." Both John and his business partner reside in Hamilton County, and their business is

located there. Harmon's office, where she wanted the depositions to be held, is in Marion County; she, in representing John's interests, did not want the depositions held at his office because it would disrupt that business. We believe Trial Rule 45(D)(2) clearly is meant to prevent someone from being forced to attend a deposition far away from their work or home against their will. John, however, through Harmon, clearly was willing to be deposed in Marion rather than Hamilton County. Additionally, the trial court clearly ordered that the parties reach an agreement as to an appropriate location for the deposition, which order McNamar violated by noticing the deposition to take place at John's office.

As for continuing to seek documents that were the subject of the original motion to compel, we conclude that McNamar's "substantial justification" for the original filing disappeared when that motion was denied. Finally, although McNamar continues to insist that he and his paralegal overheard Harmon telling someone to "thank Todd for coming in from his vacation to sign that order for me," Harmon testified to the contrary and presented other evidence suggesting that McNamar either misheard or wrongly accused her and Commissioner Ruetz of misconduct. We will not second-guess the trial court's decision to believe Harmon's version of events.

We have said, "Rule 37(A)(4) allows a successful party to obtain reasonable expenses incurred while staving off the other party's discovery demands . . . ." M.S. ex rel. Newman v. K.R., 871 N.E.2d 303, 313 (Ind. Ct. App. 2007), trans. denied. Although we conclude the initial motion to compel may have been "substantially justified," we see no reason to overturn the trial court finding that McNamar's conduct in discovery

thereafter, including utilizing accusations of misconduct against Harmon, was unreasonable. In other words, the trial court did not abuse its discretion in deciding to impose sanctions against McNamar for this conduct.

As for the amount of the fee award, we will reverse an amount as excessive only where an abuse of the trial court's discretion is apparent from the face of the record. Daimler Chrysler Corp. v. Franklin, 814 N.E.2d 281, 287 (Ind. Ct. App. 2004). Here, Harmon submitted an itemized listing of the fees incurred for time she spent dealing with the deposition and subpoena issues, as well as combating the charges of unethical conduct. The list did not include time spent on other matters related to the Sanders' divorce. Based on this list and the relatively modest amount of the award, we cannot say the amount of fees awarded is clearly excessive on its face.

Finally, Harmon requests an award of appellate attorney fees for defending this appeal. We have held as a general rule that it is appropriate to award appellate attorney fees for successfully defending an award of sanctions by a trial court under Trial Rule 37. See Mallard's Pointe Condo. Ass'n, Inc. v. L&L Investors Group, LLC, 859 N.E.2d 360, 367 (Ind. Ct. App. 2006) (citing Georgetown Steel Corp. v. Chaffee, 519 N.E.2d 574 (Ind. Ct. App. 1988), trans. denied), trans. denied. "'If appellate expenses were not awardable, then the original award would be offset [by an appellee's incurred appellate costs].'" Id. (quoting Georgetown, 519 N.E.2d at 577).

We have also said, however, "An appeal of an award of trial fees and costs does not automatically give rise to an award of appellate attorney fees." Greasel v. Troy, 690 N.E.2d 298, 304 (Ind. Ct. App. 1997). We conclude this should be true here. McNamar

was partially successful in this appeal by obtaining reversal of the first $750.00 sanction. Mallard's Pointe was a case in which the appellee was completely successful in defending on appeal the imposition of sanctions. We decline to automatically apply its holding where an appellee is only partially successful.

Instead, it is more appropriate to consider whether McNamar's appeal was replete with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay; this is the standard for awarding appellate attorney fees under Indiana Appellate Rule 66(E). See Montgomery v. Trisler, 814 N.E.2d 682, 685 (Ind. Ct. App. 2004). An award of appellate attorney fees for lack of merit should occur only when the party's contentions and arguments are utterly devoid of all plausibility. Id. We cannot say this about McNamar's appeal and will not grant Harmon's request for appellate attorney fees.[4]

Conclusion

We reverse $750.00 of the sanctions imposed against McNamar but affirm the remaining $2223.00. We deny Harmon's request for appellate attorney fees.

Affirmed in part and reversed in part.

CRONE, J., and VAIDIK, J., concur.

[4] Harmon also contends she is entitled to appellate attorney fees because McNamar violated Indiana Appellate Rule 50 by including more in his appendix than was necessary to decide this case, and that he violated Indiana Administrative Rule 9(G) by including certain information in the appendix that should have been redacted. As for the first contention, although McNamar might have included more in his appendix than was strictly necessary to decide this case, it is not such a blatant violation that by itself warrants an award of appellate attorney fees. As for the second contention, McNamar notes that Harmon did not object to unredacted versions of documents being placed in the record before the trial court.